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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

RAUL FIERRO,

Plaintiff and Respondent,

v.

RAUL REYES,

Defendant and Appellant.

B264029

(Los Angeles County
Super. Ct. No. BC505000)

APPEAL from a judgment of the Superior Court of Los Angeles County. Randy Rhodes, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup and Caroline E. Chan; Pollard Mavredakis Cranert Crawford & Stevens, Joyce L. Mavredakis and Michelle Monica Lambre for Defendant and Appellant.

Southwest Legal Group, Kevin M. Cruz and Johnathon Kim for Plaintiff and Respondent.

Defendant and appellant Raul Reyes (defendant) appeals from the judgment entered in favor of plaintiff and respondent Raul Fierro (plaintiff) after a jury awarded plaintiff \$241,473 in damages for injuries he sustained in a motor vehicle accident. Defendant contends juror misconduct denied him a fair trial and the evidence was insufficient to support the damages award. We affirm the judgment.

BACKGROUND

Plaintiff filed the instant action against defendant for injuries he sustained when a semi-truck driven by defendant rear-ended a semi-truck driven by plaintiff. Defendant did not dispute liability, but did dispute the nature and extent of plaintiff's injuries.

Trial testimony

The case proceeded to a jury trial at which plaintiff, plaintiff's treating physician and expert, Moshe Wilker, M.D., and defendant's expert, Richard Rosenberg, M.D., testified.

Plaintiff testified that he was 54 years old and was self-employed as a truck driver. He was driving southbound on the I-5 from Los Banos to Los Angeles on December 5, 2011, when defendant's truck rear-ended plaintiff's truck. After the accident, plaintiff was able to start his truck and continued to drive it to Los Angeles, where he delivered the load he had been transporting, and then drove back to Los Banos.

In the days and weeks following the accident, plaintiff experienced worsening shoulder pain that he did not have before the accident. Plaintiff's attorney referred him to a chiropractor, and plaintiff underwent 58 treatments over the course of four months. Plaintiff's shoulder pain persisted, and the chiropractor referred him to Dr. Wilker, an orthopedic surgeon.

Dr. Wilker examined plaintiff in February 2012. Plaintiff complained of shoulder pain and Dr. Wilker ordered an MRI of

the left shoulder. Dr. Wilker saw plaintiff again in April 2012 and reviewed the MRI results which indicated a rotator cuff tear. Plaintiff was also experiencing significantly limited range of motion in his left shoulder that was not improving with physical therapy. Dr. Wilker recommended arthroscopic shoulder surgery to repair the torn rotator cuff and to improve the range of motion in plaintiff's shoulder.

Dr. Wilker described the diminished range of motion in plaintiff's left shoulder as adhesive capsulitis, known in laymen's terms as "frozen shoulder." He said the condition cannot be remedied with steroid injections. Dr. Wilker explained that surgery was indicated because physical therapy was not improving plaintiff's range of motion, and over time, the condition would worsen as plaintiff's shoulder capsule starting shrinking because of disuse.

Dr. Wilker stated that plaintiff also suffered from shoulder impingement syndrome, a condition that can occur either gradually over time or "as an acute injury all of a sudden." Dr. Wilker opined that plaintiff's shoulder problems were caused by the December 5, 2011, motor vehicle accident.

Dr. Wilker testified that during plaintiff's surgery, he did not see a rotator cuff tear, but he did observe multiple adhesions, inflammatory tissue, and some labral tearing. Dr. Wilker stated that "[t]he inflammatory tissue was expected" because "[t]hat's what happens when there is a shoulder injury. If the rotator cuff is torn or stretched out really fast, it becomes inflamed." He explained that the inflammatory tissue "impinges on the rotator cuff which causes pain. So treatment for that is to basically shave it off." Dr. Wilker shaved, or debrided, the inflammatory tissue and adhesions using an instrument called a shaver. He also debrided the labral tearing.

After surgery, plaintiff's range of motion improved and his shoulder pain abated somewhat but was not eliminated. He remains unable to lift heavy objects and cannot resume work as a truck driver.

Dr. Wilker also testified as an expert on the cost of plaintiff's medical care. He opined that the reasonable cost of the chiropractic care plaintiff received after the accident was between \$3,000 to \$6,000, the reasonable cost of the surgery and post-surgery follow up was \$19,000, the reasonable cost of an anesthesiologist was between \$1,000 and \$3,000, the reasonable cost of a hospital stay following the shoulder surgery ranged between \$30,000 and \$50,000, and the reasonable cost of the post-surgery physical therapy was \$4,000.

Defendant's expert, Dr. Rosenberg, testified that he reviewed plaintiff's medical records and medical billing statements. Dr. Rosenberg stated that plaintiff had been diagnosed with left shoulder impingement syndrome, which occurs when a tendon is rubbing against a bone. He said the condition can occur because of repetitive motion in the shoulder but that it typically occurs after age 35 as bones start to enlarge because of calcium deposit accrual. Dr. Rosenberg further stated that while "surgery is a perfectly acceptable way of treating" shoulder impingement syndrome, most orthopedic surgeons would first treat the condition with cortisone injections.

Dr. Rosenberg further testified that plaintiff's MRI results showed a "false positive" for a rotator cuff tear, and that the most accurate means of diagnosing a torn rotator cuff is to perform a shoulder arthroscopy. Plaintiff's shoulder arthroscopy revealed adhesions, which were the cause of plaintiff's shoulder pain. When asked whether adhesions occur over time or are the result of trauma, Dr. Rosenberg replied, "[i]t occurs over time, but [a]

traumatic event will cause a tear, like a tear of the fabric or something, tear of the rotator cuff or labrum.”

Dr. Rosenberg opined that the only injury plaintiff sustained as a result of the accident was a minor sprain of the AC joint. Dr. Rosenberg explained that when plaintiff first sought medical attention after the accident, he did not experience enough shoulder pain to warrant x-rays, and he did not seek any medical treatment for his shoulder until a month later. Dr. Rosenberg stated that plaintiff’s surgery addressed wear and tear in the shoulder that had occurred over time consistent with someone in plaintiff’s age group. Dr. Rosenberg further opined that the medical expenses plaintiff incurred were excessive, and that the reasonable cost of plaintiff’s surgery was between \$23,000 and \$25,000.

Jury verdict

At the conclusion of the trial, the jury returned a special verdict awarding plaintiff \$241,473 in damages, consisting of \$56,473 for past medical expenses, \$0 in future medical expenses, \$135,000 for past physical and mental pain and suffering, and \$50,000 for future physical and mental pain and suffering.

Motion for new trial

After the trial concluded, the trial court allowed the parties’ attorneys to speak with the jurors. Dakota Mitchell, a personal trainer who had served as the jury foreperson, told counsel that he believed plaintiff had suffered a “labral tear” in the left shoulder, and that labral tears are always trauma-related and require surgery. Mitchell admitted knowing that jurors were not permitted to use their personal experience or expertise to dictate their opinions about the case, but given his experience as a personal trainer reading medical records and speaking with doctors, he could not help himself.

Defendant filed a motion for a new trial, based primarily on Mitchell's declaration.¹ Plaintiff opposed the motion, but offered no evidence in support of the opposition, apart from a declaration by plaintiff's counsel stating that defendant had made an offer to compromise for \$100,001, and that plaintiff had made an offer to compromise before trial for \$200,000. Plaintiff also moved to strike Mitchell's declaration under Evidence Code section 1150, subdivision (a) as inadmissible evidence of a juror's mental process in arriving at a verdict.

The trial court denied plaintiff's motion to strike,² stating that it had read and considered all of the parties' submissions. The trial court stated that there were "things in this case that have a whiff . . . of problems" and that it agreed "to some extent" with defense counsel's argument that misconduct had occurred. The trial court concluded, however, that the evidence presented at trial rebutted any presumption of prejudicial misconduct. The court noted that the testimony of various witnesses supported both plaintiff's claims and the jury's verdict, and that any confusion on the part of the jury regarding a labral tear injury was "more of an evidentiary proof issue" than an issue of jury misconduct. The trial court denied defendant's motion for a new trial, and this appeal followed.

DISCUSSION

I. Juror misconduct

A. Applicable law and standard of review

Juror misconduct is a ground for granting a new trial. (Code Civ. Proc., § 657, subd. 2.) When evaluating a motion for a

¹ In addition to Mitchell's declaration, defendant submitted declarations by Dr. Rosenberg and by defendant's trial counsel.

² Plaintiff moved to strike all of the declarations and evidence submitted in support of defendant's new trial motion, and the trial court denied all of the motions.

new trial based on juror misconduct, the trial court must undertake a three-step process. First, the trial court must determine whether the affidavits in support of the motion are admissible. (Evid. Code, § 1150; *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) Second, if the evidence is admissible, the trial court must then determine whether the facts establish misconduct. (*Barboni, supra*, at p. 345.) Finally, assuming misconduct occurred, the trial court must determine whether the misconduct was prejudicial. (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160 (*Whitlock*).)

Juror misconduct raises a rebuttable presumption of prejudice. (*Whitlock supra*, 160 Cal.App.4th at p. 162.) The presumption may be rebutted by an affirmative evidentiary showing that prejudice does not exist. (*Ibid.*) It may also be rebutted by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417 (*Hasson*), overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 580.)

During oral argument, defendant argued that the presumption of prejudice accorded by juror misconduct must be rebutted by affirmative proof that no prejudice actually resulted and cannot be rebutted, as the Supreme Court in *Hasson* held, "by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. [Citations.]" (*Hasson, supra*, 32 Cal.3d at p. 417, fn. omitted.) None of the cases cited by defendant support his position.

Defendant cited *Jones v. Sieve* (1988) 203 Cal.App.3d 359 (*Jones*) as rejecting the Supreme Court's holding in *Hasson* that appellate review of the record is a means of determining whether juror misconduct was prejudicial. The appellate court in *Jones*

did not reject *Hasson* but distinguished “the *Hasson* court’s alternative independent review of the record method, to determine whether the presumption of prejudice was rebutted,” as the standard applicable to review of an order denying a new trial motion. (*Jones, supra*, at p. 368.) That standard did not apply, the *Jones* court concluded, to review of an order *granting* a new trial motion, the procedural posture of the case before it. (*Ibid.*) Because the instant appeal concerns the denial of a motion for a new trial, *Jones* is inapposite.

Smith v. Covell (1980) 100 Cal.App.3d 947, another case cited by defendant, does not support his argument that the presumption of prejudice accorded by juror misconduct can be rebutted only by an affirmative evidentiary showing of no prejudice, and not by a reviewing court’s examination of the record. The court in *Smith* undertook such a review, after the plaintiff in a personal injury trial appealed from the judgment on the basis of juror misconduct. (*Id.* at p. 951.) The evidence of misconduct included several juror declarations, which were uncontradicted, describing acts of misconduct. (*Id.* at p. 952.) In determining whether the resulting presumption of prejudice had been rebutted, the court in *Smith* undertook a review of the entire record, including the medical testimony, which the court found to be “in sharp conflict.” (*Id.* at p. 954.) Given the sharply conflicting evidence as to causation of the plaintiff’s injury, the court in *Smith* concluded that the presumption of prejudice had not been rebutted. (*Ibid.*)

McDonald v. Southern Pacific Transportation Co. (1999) 71 Cal.App.4th 256 (*McDonald*), the third case cited by defendant as support for the argument that prejudice presumed as the result of juror misconduct cannot be rebutted by a reviewing court’s examination of the entire record, contradicts rather than supports that argument. The court in *McDonald* quoted the

standard set forth in *Hasson, supra*, 32 Cal.3d at page 417: “A showing of misconduct creates a presumption of prejudice, which in turn ‘may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court’s examination of the entire record to determine whether there is a reasonable probability of harm to the complaining party resulting from the misconduct. . . .’ [Citation.]” (*McDonald, supra*, at p. 265.)

“We review independently the trial court’s denial of a new trial motion based on alleged juror misconduct. [Citation.] However, we will “‘accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.’” [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 396.)

B. Evidence of misconduct and its admissibility

Defendant’s motion for a new trial was supported primarily by the declaration of juror Mitchell, who was knowledgeable about shoulder injuries from his 30 years of experience as a personal trainer, who understood that plaintiff had suffered a full tear of the labrum, that a labrum tear is always caused by trauma and not by typical use; and that he included the cost of surgery when deciding on the amount of plaintiff’s damages award.

Mitchell’s declaration also described his interaction with other jurors during deliberations:

“13. Some of my fellow jurors asked me what can cause a labrum tear, and I told them that it could be caused by repetitive motion, but because there was no evidence of any repetitive motion in the evidence or the record, then they must conclude that it was caused by the trauma of the accident.

“14. During deliberations, my fellow jurors asked me why more rehab was not attempted as an

alternative to surgery to repair the labrum tear and I told them that rehab can help to repair the muscle and tissue around the labrum, but if there is a full tear of the labrum, then surgery is required.”

“Evidence of jurors’ internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.] Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror’s subjective reasoning process. [Citation.] Accordingly, juror declarations are inadmissible to the extent that they purport to describe the jurors’ understanding of the instructions or how they arrived at their verdict. [Citations.]” (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125, fn. omitted.)

The trial court denied plaintiff’s motion to strike Mitchell’s declaration as inadmissible, and chose instead to consider the appropriate weight it should be accorded. Plaintiff argues Mitchell’s declaration was inadmissible because it contains subjective statements about his mental processes. The relevant portions of Mitchell’s declaration, however, describe overt acts -- his statements to other jurors during deliberations. For that reason we find no abuse of discretion by the trial court in deeming the declaration admissible.

C. Did misconduct occur?

We agree with the trial court’s determination that Mitchell’s statements to the other jurors had a “whiff” of impropriety and constituted misconduct. While “[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical

subject,” that opinion must be based on the evidence at trial. (*In re Malone* (1996) 12 Cal.4th 935, 963.) “A juror . . . should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror’s own claim to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]” (*Ibid.*, fn. omitted.)

D. Was there prejudice?

Mitchell’s statements to his fellow jurors during deliberation created a rebuttable presumption of prejudice. (*Whitlock, supra*, 160 Cal.App.4th at p. 162.) That presumption, however, was rebutted by the evidence in the record.

There was evidence that plaintiff sustained an injury to his left shoulder, that the accident was the cause of the injury, and that surgery was the appropriate course of treatment. Plaintiff’s expert, Dr. Wilker, testified that plaintiff suffered from shoulder impingement syndrome, adhesive capsulitis, and some labral tearing. A pre-surgery MRI showed that plaintiff also had a possible torn rotator cuff. Plaintiff testified that he never had any shoulder problems before the accident, and Dr. Wilker opined that the accident was the cause of plaintiff’s shoulder injury. Dr. Wilker further testified that plaintiff’s shoulder problems could not be remedied with steroid injections or continued physical therapy, and that surgery was the appropriate treatment.

Defendant’s expert, Dr. Rosenberg, agreed that the MRI of plaintiff’s left shoulder showed a rotator cuff tear, that MRI’s are sometimes inaccurate, and that a shoulder arthroscopy was the best means of verifying whether or not plaintiff’s rotator cuff was actually torn. Dr. Rosenberg testified that a torn rotator cuff or a torn labrum is caused by a traumatic event rather than repetitive use of the shoulder over time. Dr. Rosenberg further testified

that surgery was “a perfectly acceptable” means of treating plaintiff’s shoulder impingement syndrome.

Juror Mitchell’s statement to the other jurors that a labrum tear is caused by trauma was consistent with the testimony of both experts. Both experts also testified that surgery was an appropriate treatment for plaintiff’s shoulder problems. There is thus ample evidence in the record to rebut any presumption of prejudice. In contrast, there is no evidence that juror Mitchell’s confusion as to whether plaintiff had suffered a full or partial labral tear influenced any of the other jurors or caused them to alter the verdict. Our examination of the record as a whole accordingly leads us to conclude that there was no prejudicial juror misconduct. (*Hasson, supra*, 32 Cal.3d at p. 417.)

II. Damages

Defendant challenges the sufficiency of the evidence supporting the \$241,473 damages award. An appellate court reviews a jury’s award of damages under the substantial evidence standard and defers to the trial court’s denial of a new trial motion based on excessive damages. (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720-721.) A reviewing court “will interfere only when the award is so disproportionate to the injuries suffered that it shocks the conscience and virtually compels the conclusion the award was based on passion or prejudice. [Citation.]” (*Ibid.*)

“There are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is ‘a matter on which there legitimately may be a wide difference of opinion’ [citation]. In considering the

contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation]." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508.)

There is substantial evidence in the record to support the \$241,473 damages award, which consists of \$56,473 in past medical expenses, \$135,000 in past physical and mental pain and suffering, and \$50,000 in future physical and mental pain and suffering.

Dr. Wilker testified as an expert with regard to the reasonable cost of plaintiff's past medical care, including the pre-surgery physical therapy, the MRI, the surgery, and post-surgery rehabilitation. Based on Dr. Wilker's testimony, the reasonable total cost of plaintiff's past medical care ranged between \$53,000 and \$79,000. Substantial evidence supports the award for past medical expenses.

Substantial evidence also supports the award for past and future physical and mental pain and suffering. Plaintiff testified that in the days and weeks following the accident he experienced worsening pain. Although four months of physical therapy brought him some relief, the continuing pain became unbearable, so plaintiff consulted with Dr. Wilker, an orthopedic surgeon, who recommended surgery. Plaintiff further testified that his shoulder pain continued after the surgery, that he experiences pain every day, and that he can no longer work as a truck driver. Dr. Wilker testified that although the surgery improved plaintiff's range of motion and reduced his shoulder pain, plaintiff had reached "maximum medical improvement" and his condition would not improve in the future. Dr. Wilker further stated that plaintiff would probably have shoulder pain for the rest of his life.

Defendant argues that the damages award is excessive because there was evidence that the accident was minor, that plaintiff continued to drive more than 300 miles after the accident and sought no medical attention for nearly a month afterward. Defendant further argues that the award is 400 percent larger than jury verdicts in similar shoulder injury cases.

Under the standard applicable here, however, we do not reweigh the evidence; rather, we consider the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor. (*Westphal v. Wal-Mart Stores, Inc.* (1988) 68 Cal.App.4th 1071, 1078.) Substantial evidence supports the damages award.

DISPOSITION

The judgment is affirmed. Plaintiff is awarded his costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
HOFFSTADT